



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Mr. Miles Risley
City Attorney
City of Victoria
Legal Department
P. O. Box 1758
Victoria, Texas 77902-1758

OR95-1495

Dear Mr. Risley:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 20582.

The Police Department of the City of Victoria ("the city") received a request from a reporter for all documents pertaining to disciplinary proceedings resulting from a "complaint of sexual harassment" against a certain police officer, including statements made by the officer, the victim, and other witnesses, the dates of the alleged harassment, and the dates of all disciplinary proceedings. The request is also for information about any other complaints and disciplinary proceedings pertaining to the officer and for information about the city's personnel policies regarding sexual harassment. You say the city will release the officer's "name, length of employment, job related test results, information about the manner in which [the officer] performs his job, and [information about] the reasons and circumstances surrounding demotion, suspension, resignation or termination." You raise no exception to the release of information about the city's personnel policies regarding sexual harassment; we assume this has been or will be released. You raise several exceptions in the Open Records Act to the required public disclosure of the remainder of the requested information.

You first raise section 552.103(a), the litigation exception, which applies to information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. Open Records Decision No. 551 (1990) at 4. Your office had originally claimed that litigation was reasonably anticipated in this case. However, on December 6, 1995, you informed this office that the litigation to which the requested

information purportedly relates has concluded. The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Accordingly, you may not rely upon section 552.103(a) as a basis for withholding any of the requested information.

We next address your claim that section 552.101 in conjunction with article 4413(29cc), V.T.C.S., excepts from required public disclosure information relevant to a polygraph examination.¹ V.T.C.S. article 4413(29cc), section 19A provides in pertinent part:

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Subsection (d), which specifies persons to whom information acquired from a polygraph examination may be disclosed, is not applicable to this request. However, we must determine whether the requested documents contain "information acquired from a polygraph examination." See Open Records Decision No. 316 (1982) at 2.

You seek to withhold a memorandum, dated May 14, 1993, from O.T. McAlister, Deputy Chief, the polygraph examiner, to Ronald G. Perkins, Chief of Police which contains information about a question the examiner asked, information about events that occurred during the test, the examiner's opinion about those events, and the examiner's conclusions about the test. This office has determined that the phrase, "information acquired from a polygraph examination," in section 19A (b) embraces the notes, records and examination records of a polygraph examination given a police officer. See *id.* Furthermore, that phrase also applies to the written/printed results of the full examination, including all questions asked and those marked as control questions. See Open Records Decision No. 430 (1985) at 5. We find that this memorandum contains "information acquired from a polygraph examination" for purposes of section 19 (b) of the Polygraph Examiners Act and conclude that the city must withhold this memorandum under section 552.101 of the Government Code in conjunction with V.T.C.S. article 4413(29cc), section 19A(b).

We next address your assertion that portions of the enclosed materials are excepted from required public disclosure under section 552.101 as information deemed confidential by judicial decisions which recognize the common-law right to privacy. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The

¹Section 552.101 excepts from required public disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision.

protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider the applicability of these two exceptions together.

In order to be within the common-law right to privacy, the information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) be of no legitimate concern to the public. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information that identifies a person as a victim or witness involved in an investigation of an allegation of sexual assault is highly intimate and embarrassing information about those individuals' private affairs so that its release would be highly objectionable to a reasonable person. *See Morales v. Ellen*, 840 S.W.2d 519 at 524-525 (Tex. App.--El Paso 1992, writ denied). Furthermore, the statements of the victim and of witnesses in such an investigation likewise constitute highly intimate and embarrassing information about those individuals' private affairs. *See id.* Thus, the identity and statements of the victim and the witnesses in the investigation of the assault in this case are private information under the first branch of the test for common-law privacy set out in *Industrial Foundation*. We, therefore, must reach the second part of the test: whether the public has a legitimate interest in the identities of the victim and the witnesses and in their statements.

The public possesses a legitimate interest in knowing the reasons for disciplining a police officer. *See id.* at 525; Open Records Decision No. 350 (1982) at 3. A police officer's privacy rights are not violated by the release of letters advising the officer of disciplinary action taken. *See id.* In this case, two documents, the "Disciplinary Notice to the Employee" and the "Preliminary Determination," contain information which discloses the reasons for disciplining the officer. This information is public. *See id.* Since the reasons for disciplining the officer in these two documents must be released, we do not think the public has an interest in knowing the identities of the victim of the alleged assault and of the witnesses, nor in their statements. *See Morales*, 840 S.W.2d at 525. We therefore conclude that you must withhold the name and statement of the alleged victim as well as the names and statements of the witnesses.² You must also withhold a small portion of information about the officer's private affairs which the public has no legitimate interest in knowing. We have marked those portions of the requested information which must be withheld. The remainder must be released to the requestor.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous

²You need not withhold the name of the woman who was contacted as a possible witness, but who did not make a statement.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/ch

Ref.: ID# 20582

Enclosures: Marked documents

cc: Mr. Gerald Farrell
The Victorian Advocate
311 East Constitution
Victoria, Texas 77901
(w/o enclosures)